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In The

Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, CALIFORNIA REPUBLICAN PARTY, LIBERTARIAN PARTY OF CALIFORNIA and PEACE AND FREEDOM PARTY, et al.,

Petitioners,

v.

BILL JONES, SECRETARY OF STATE OF CALIFORNIA and CALIFORNIANS FOR AN OPEN PRIMARY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE CALIFORNIA GOVERNOR GRAY DAVIS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the First Amendment prohibits California's voters from adopting the blanket primary, which allows voters of any political affiliation to vote for any candidate in the primary.

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CONSTITUTIONAL PROVISION

California Constitution, article V, § 1 1

INTEREST OF AMICUS CURIAE[1]

Governor Gray Davis, thirty-seventh Governor of the State of California, has several important interests in urging this Court to uphold the State's blanket primary. As ***Governor***, Gray Davis has an interest in seeing that the Open Primary Act is faithfully executed. Cal. Const., art. V, § 1. As California's ***highest constitutional officeholder***, Governor Davis represents the interests of all Californians, who exercised their sovereignty through their initiative power in adopting the blanket primary. As a ***candidate*** – the first Governor elected under the blanket primary – Governor Davis has an interest in preserving an election process that provides all candidates the opportunity to attract support from the entire electorate.

SUMMARY OF ARGUMENT

Since its enactment in 1996, the blanket primary has enhanced the democratic nature of California's elections by encouraging candidates to appeal to the entire electorate, by increasing debate and participation, and by producing candidates who are more reflective of the entire citizenry.

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[1] This brief is filed with the written consent of all parties, on file with the Clerk of the Court. This brief is not authored, in whole or in part, by any counsel for a party. Nor did any person or entity make a monetary contribution to the preparation or submission of this brief.

Adopted by a direct vote of the people through the initiative process, the blanket primary represents the considered judgment of the citizens of California as to how to structure their electoral process. California voters chose a more democratic system in the hopes of selecting officials who would be reflective of the entire electorate. This is a political decision to be made by the voters, not the courts. The blanket primary does not severely burden California's political parties, and the desire of party officials for party control of a critical stage of the State's electoral process should not override the voters' First Amendment rights. The First Amendment simply does not prohibit the citizens of California from adopting an electoral system that increases the democratic nature of the State's elections.

ARGUMENT

I.

THE BLANKET PRIMARY HAS ENHANCED THE DEMOCRATIC NATURE OF CALIFORNIA'S ELECTIONS

California has conducted two elections since the voters adopted the blanket primary in 1996.[2] In 1998, Governor Davis was nominated in the first gubernatorial

[2] Respondents have lodged with the Court the statement of the vote of California's two blanket primaries to date, both conducted after trial in this matter. Resp.'s Second Lodging.

primary held under the blanket primary. In March 2000, California conducted its second primary under the statute, including a presidential primary. These two elections confirm that the blanket primary enhances the democratic nature of California's electoral process and the representativeness of its elected officials, as predicted by the courts below. *California Democratic Party v. Jones*, 169 F.3d 646, 660 (9th Cir. 1999) (hereafter "Opinion").

A. The Blanket Primary Encourages Candidates To Appeal To The Total Electorate

This Court has recognized that California's primary is a critical stage of the electoral process because it narrows the field of candidates. As a practical matter, the ultimate choice of voters in the general election is largely determined in the primary. See, *Storer v. Brown*, 415 U.S. 724, 735 (1974); *Morse v. Republican Party*, 517 U.S. 186, 205-206 (1996).

Under the closed primary system, voters in the general election were limited to choosing among those candidates pre-selected by a narrow subset of voters who did not reflect the total electorate. Pre-selection of the candidates through the closed primary system had particularly harmful effects in California, where the number of independent voters continues to grow rapidly. Opinion at 660-661. Since 1990, one-third of all new voters have registered as independents, as many as registered as Democrats and Republicans ***together***. RT at 939.[3] In California, most voters traditionally are not strong partisans –

[3] Amicus curiae adopts the same citation to the record used by the parties and courts below: "RT" is the Reporter's

Californians pride themselves on voting for the candidate, not for the party. RT at 652.[4]

The blanket primary now encourages candidates to appeal to a larger section of the electorate and thus, expands the scope of debate beyond limited partisan concerns. "Candidates will perceive a need ***or opportunity*** to attract support from the entire electorate, not simply from members of their respective parties." Opinion at 658 (emphasis added).[5] Past experience in California has proven this to be true, as illustrated by the decision of the unopposed Republican gubernatorial

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Transcript, "ER" is the Excerpt of Records, and "CR" is the District Court's Clerk's Record.

[4] The courts below explained why it is a misnomer to call people affiliated with a party in California's closed primary "party members." "These voters have not allied themselves to a political party in the customary way that one normally becomes a member of a private association; they have not paid dues, taken an oath, expressed agreement with certain ideals or goals, attended meetings, accepted any obligations, or attended upon any other rite of initiation." Opinion at 665.

It is therefore not surprising that in California, 23 percent of registered Democrats do not identify with the party, while another 36 percent do not consider themselves strong partisans. For registered Republicans, 24 percent do not identify with the party and 32 percent do not consider themselves strong partisans. RT at 651.

[5] Petitioners acknowledge that the blanket primary will broaden debate, but cite this as one of the ***harms*** of the measure. See RT at 721 [the blanket primary may, for example, require parties to "reopen" discussion of abortion].

candidate to participate in debates with the three contenders for the ***Democratic nomination***.[6]

B. Increased Debate, Competition And Interest Lead To Greater Voter Participation

Voter participation in California had declined markedly during the two decades prior to enactment of the blanket primary, dropping 15 to 20 percent. Opinion at 661; RT at 658, 661-662. In contrast, turnout in blanket primary states was higher than in California. Based upon this evidence, the courts below found "reason to expect" that, by providing more choice and more competitive elections, the blanket primary would encourage greater participation in California's primaries. Opinion at 662.

The courts' prediction was correct. Voter turnout in June 1998 was the highest in sixteen years for a gubernatorial primary. Resp.'s Second Lodging. This turnout was particularly remarkable given that the Republican race was virtually uncontested. Two years later, the March 2000 primary election also produced the highest voter turnout for a presidential primary in twenty years. *Ibid.*

California's voters adopted the blanket primary to provide greater choice, restore healthy competition and increase voter participation. Opinion at 649. The evidence to date is clear – the blanket primary has significantly increased the democratic nature of California's elections.

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[6] See Appellees' Request for Judicial Notice filed before the Ninth Circuit.

C. The Blanket Primary Produces More Representative Officials

California voters believed that the closed primary ultimately produced officeholders not representative of the electorate at large who were ill-suited to solve the State's problems. The blanket primary, they were told, would make elected officials more responsive to the total electorate. Opinion at 649. The record convincingly demonstrates that officials elected under blanket primaries do, in fact, stand closer to the median policy positions of their constituents than those elected under closed primaries. *Id.* at 661, fn. 34; RT at 693-696.

Governor Davis exemplifies this phenomenon. He campaigned in the blanket primary as a problem-solver, who would reflect the concerns and opinions of the broad electorate when governing, not of a narrow political constituency. His platform drew support from Republican, independent and minor party voters in the primary election – more support than for any other candidate. Resp.'s Second Lodging.[7] This support continued through the general election, where Governor Davis won by almost 20 percentage points. *Ibid.* As the courts below predicted, the blanket primary offers candidates with views who appeal to a broader base the ***opportunity*** to attract supporters from the entire electorate. Opinion at 658.

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[7] See also, R. Michael Alvarez & Jonathan Nagler, *Should I Stay or Should I Go? Sincere and Strategic Crossover Voting In California's Open/Blanket Primary: A Natural Experiment in Electoral Dynamics* (Bruce Cain & Elisabeth R. Gerber ed., forthcoming 2000) discussed in detail in the Amicus Curiae Brief submitted by the Brennan Center For Justice at pp. 15-16.

The State, moreover, has a "substantial interest" in ensuring that officeholders truly represent the broad community. Such support encourages compromise and political stability. *Storer v. Brown, supra,* 415 U.S. at 729. The blanket primary advances these state interests by producing elected officials who are more reflective of the electorate as a whole. Opinion at 662, fn. 34; RT at 693-696.

II.

THE CITIZENS OF CALIFORNIA SHOULD NOT BE PRECLUDED FROM THEIR DECISION TO ENHANCE THE DEMOCRATIC NATURE OF THEIR ELECTIONS

A. The Voters' Decision On Structuring Elections Should Be Respected

California's citizens adopted the blanket primary by a direct vote through the initiative process. California's initiative is "one of the most precious rights of our democratic process." It is a power reserved by the People to be "jealously guarded" in accordance with the view that all power of government ultimately resides with the People. *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore,* 18 Cal.3d 582, 591, 557 P.2d 473 (1976).

There can be no act more basic to a democracy than the direct vote of its citizens to increase the democratic nature of their election process and representativeness of those selected to govern. This vote represents the "considered judgment" of the citizens of California, and should not be lightly overturned. See *Gregory v. Ashcroft,* 501 U.S. 452, 471 (1991).

B. Preserving Confidence In The Electoral Process Is A Substantial State Interest

California's voters concluded that the blanket primary would produce more representative officials, who are less beholden to partisan politics and special interests. Opinion at 661. The courts below found that this "fundamental goal" of enhancing representativeness by providing all voters with a choice not predetermined by party members alone ***can only be advanced by the blanket primary***. *Id.* at 662.

Preserving confidence in our system of representative government is, of course, a substantial state interest. See, e.g., *United States Civil Service Com. v. National Asso. of Letter Carriers AFL-CIO*, 413 U.S. 548, 565 (1973); and *Buckley v. Valeo*, 424 U.S. 1 (1976). This includes assuring that independent-minded voters have an opportunity to associate and participate in the political process. See, *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983).

C. The Associational Rights Of Political Parties Are Not Absolute

"Partisan politics bears the imprimatur only of tradition, not the Constitution." *Elrod v. Burns*, 427 U.S. 347, 369, fn. 22 (1976). Neither the right to associate nor the right to participate in political activities is absolute. *United States Civil Service Com., supra*, 413 U.S. at 567. This Court has repeatedly found that preservation of the democratic process is an interest that may justify limitations on political activities otherwise protected by the First

Amendment. See *Elrod* at 368; *Buckley, supra*, 424 U.S. 1; and *United States Civil Service Com.* at 567.

While political parties have associational rights protected by the First Amendment, the courts below found that these interests were not severely burdened by the blanket primary. Opinion at 659. As demonstrated above, the two primaries conducted since trial confirm the courts' assessment.

This Court is asked to resolve conflicting interests under the First Amendment: the desire of party officials to close primary elections to party members only, versus the desire of the electorate – including a majority of party members – to increase the democratic nature of the election process. When asked to balance a similar conflict between the parties' interest in political patronage and its chilling effect upon the election process, this Court explained:

> "The illuminating source to which we turn in performing the task is the system of government the First Amendment was intended to protect, a democratic system whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political concern. Our decision in obedience to the guidance of that source does not outlaw political parties or political campaigning and management. Parties are free to exist and their concomitant activities are free to continue. We require only that the rights of every citizen to believe as he will and to act and associate according to his beliefs be free to continue as well." *Elrod* at 372; see also *Rutan v. Republican*

Party, 497 U.S. 62, 91-92 (1990) (Stevens, J., concurring).

Protection of the political parties' right of association is not the predominant goal. It is simply the means to achieve participation in the democratic process. Any benefits that the closed primary may provide to party officials are inadequate to justify sacrificing the voters' First Amendment interest in a truly democratic electoral process. See, e.g, *Elrod* at 370.

D. Structuring The Electoral Process Is A Political Question To Be Left To The Voters

The courts below correctly concluded that it was for California's voters, not the courts, to determine whether a more representative and participatory electoral system is desirable, and whether it is wise to open the primary to further these goals. Opinion at 662.

Balancing these interests is a "political arrangement," and where there is no bright line that can be known by judges and applied nationally the determination should be left to the People. See, e.g., *Rutan v. Republican Party, supra*, 497 U.S. at 110-114 (Scalia, J., dissenting). Courts are not representative bodies. "History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing . . . political pressures." *Dennis v. United States*, 341 U.S. 494, 525 (Frankfurter, J., concurring).

Constitutional issues cannot be resolved on the basis of public opinion. However, when a question is debatable, such as the relative benefits of the blanket primary, the voters' widespread belief as to its merits must be considered. See *Muller v. Oregon*, 208 U.S. 412, 420-421 (1908). As Justice Holmes cautioned: "I think that the word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that . . . the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." *Lochner v. State of New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting); see also *United Public Workers v. Mitchell*, 330 U.S. 75, 102 (1947) [Congress' regulation of employees' political activities is upheld unless it "passes beyond the general existing conception of governmental power" developed from practice, history and changing societal conditions].

The blanket primary has been in continuous use since 1935. Opinion at 650. The decision of California's voters to adopt an electoral process enjoyed in other states since Franklin Roosevelt was President can hardly be said to infringe upon fundamental political principles as they have been understood by tradition and law.

CONCLUSION

As the courts below explained, the issue is not whether California's voters chose wisely in adopting the blanket primary. Instead, this Court must decide whether the First Amendment prohibits Californians from ever

adopting this electoral process. Opinion at 662-663. It does not.

California's voters properly concluded that the blanket primary will enhance the democratic nature of this State's elections and the representativeness of those elected to govern. The record below and experience to date bear this out. There is no support in law, policy, or our political tradition to conclude that the First Amendment – intended to ensure robust debate and participation in a representative democracy – ***prohibits*** the voters from utilizing this electoral process. As Justice Black explained:

> "Our political system, different from many others, rests on the foundation of a belief in rule by the people – not some, but all the people. Education has been fostered better to fit people for self-expression and good citizenship. In a country whose people elect their leaders and decide great public issues, the voice of none should be suppressed – at least such is the assumption of the First Amendment." *United Public Workers of America, supra,* 330 U.S. at 576-577 (Black, J., dissenting).

Consistent with our long tradition of constitutional law, the First Amendment cannot be read to prohibit California voters from structuring their elections to maximize both democratic participation and the representativeness of those elected to govern. The well-

reasoned judgment of the courts below should be affirmed.

Dated: March 30, 2000

Respectfully submitted,

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